IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA-15-0573

GREGORY JACKSON,

Petitioner and Appellant,

vs.

KATHERINE JACKSON,

Respondent and Appellee.

APPELLANT'S OPENING BRIEF

On appeal from the Montana Fourth Judicial District Court
The Hon. Ed McLean, Presiding

APPEARANCES:

Michael Sol and Terry L. Wolfe
SOL & WOLFE Law Firm PLLP
101 East Broadway #300
Missoula, Montana 59802

Counsel for Petitioner and Appellant

David B. Cotner
DATSOPOULOS, MACDONALD & LIND
201 West Main Street
Missoula, MT 59802

Counsel for Respondent and Appellee

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I. STATEMENT OF CASE

The Petition for Dissolution was filed by Greg Jackson August 24, 2009.

Trial was held over a three day period beginning March 12, 2012, before Special Master Susan Leaphart in Fourth Judicial District Department 1 (The Honorable Ed McLean). The transcript of the trial is referred to herein as "TT" in three volumes. A subsequent hearing before the District Judge is referred to "HT." Special Master Findings and Conclusions are referred to as "SM FF or SM CL" and the District Court's later Findings and Conclusions as "DC FF or DC CL."

The property of the parties consisted of two residences, two hospice businesses, vehicles, cash, investment accounts, and personal property.

For the purpose of dividing the marital property, the parties were in agreement on most items of value, their vehicles, their family home on Grant Creek, cash on hand in a variety of accounts. The parties disagreed on the value of the businesses.

Proposed Findings of Fact and Conclusions of Law were issued May 27, 2012. Both parties filed objections. The District Court held a lengthy series of settlement conferences and discussions and issued a Final Order, Findings of Fact and Conclusions of Law May 6, 2015.

Motions to Alter or Amend were made on June 23, 2015. No further rulings

were made by the District Court.

Appeal was taken on September 18, 2015.

A mediator was appointed October 18, 2015. Mediation failed.

Subsequently, the parties attempted to determine if alternative dispute resolution might offer a satisfactory alternative to appeal and possible remand, and additional time in the judicial system.

The efforts to agree to arbitration ultimately failed.

II. STATEMENT OF ISSUES

A. Did the Special Master incorrectly divide the marital estate under the standards of MCA 40-4-422?

B. Did the District Court improperly alter the Special Master's findings and Improperly Revalue the Family Businesses?

C. **The Court identified substantial additional funds attributable to Greg from pre-marital sources in the marital estate, but then did not account for them in the marital disposition nor award them to Greg.**

D. The Parties had agreed on 50/50 ownerships of the marital businesses during the marriage. Did the Court err by disregarding those agreements?

III. STATEMENT OF FACTS

Greg and Kit Jackson were married in Helena, Montana December 31, 1991. [TT, 1, 14:23].

As of the date of the final Decree, Greg was 71 years old and Kit was 62.

Greg's has neuropathy and has had heart problems [TT, I, 25: 5-14, 116:1-28, 117:1-20]. Kit has enjoyed excellent health.

No children were born to the marriage.

At the time of their marriage, Greg was retiring from the State of Montana. His primary asset was his PERS pension [TT 1, 15:8-10].

Kit was attending school at Carroll College, and had student debt of approximately $20,000. After her graduation in 1992, Kit was employed in a variety of jobs over the next seven years, working as an EMT, in a neo-natal ICU, as a cardiac charge nurse, pediatric oncology, and in home health care. "Kit was 'let go' from some positions and voluntarily left others." [TT 1, 19:19-25, 20: 1-21, FF #8].

Despite his retirement from the State of Montana, Greg continued working through 1995 earning $40,000 annually. [TT 1, 21:14] In 1998, Kit received a job offer in Utah. [TT, 1, 23:24, 24: 1-8].Greg agreed to move, finding employment as a traffic engineer for $70,000.[1] [TT 1, 28:19-20].

By 1999, Greg and Kit started a home hospice care business, "Hospice for Utah" ["HFU"]. They disagreed on the level of contribution of each to HFU. Greg stated that he had looked into the business side, saw the reimbursement rates, and

[1] FF #14 states, however, that the parties licensed HFU in December, 1997.

put together a cost and income analysis. [TT 1, 30:1-25]. Greg started "pressing" Kit to consider the idea. [TT 1, 31:1-25]. They elected to proceed, and as income from HFU developed, after two years, that permitted Greg to finally actually retire. [TT, 1, 29:1-13, 33: 10-14]. Kit did not feel that Greg contributed much, but that he did "help" setting computer systems, billing and payroll, and did "odd jobs." [TT 2, 370:3-25]. Throughout, he and the company accountant produced the "cost report," an "extensive" and required report to Medicare annually. "We really had to dig to get all that information and Greg did that with the CPA." [TT 2, 371:1-25]. It was an "audit process" for Medicare. [TT 2, 372:1-18].

Greg had been working full-time for HFU as "the biller, the bill payer, and IT support." [TT 1, 53:8-25]. Greg and Kit discussed the businesses, "all the time, breakfast, lunch and dinner." [TT 1, 55:1-8].

At Utah, the medical director recalled Greg well. "I certainly knew Greg and Greg was somebody that I would run into when I would come in. Greg was always real encouraging. In fact I remember every time I would see him and shake his hand, he would say, "I hear you are doing a great job, you know, out there." [TT I 232: 17-24]. "I remember some of the times I would be in the office and one time the accountant was there and Greg was talking about the cost report. ... it sounds like something with a lot of numbers on it... that was my impression, that Greg

was involved more on that end of the business." [TT I, 234:2-11].

Early on, HFU was an S-corp, a joint venture between Kit and Greg. They took draws of the profits as equal owners [TT 1, 36:6-25, 37:9-23].

In 2001, Greg had heart surgery, and he was "less active in the hospices during this time." [TT 2, 384:23-15, 385:1-14].

In 2002, Greg and Kit agreed to move to Missoula, Montana and began a similar hospice care business, "Hospice of Missoula" ["HOM] while continuing to operate HFU. Greg stayed behind in Utah to sell the family home, while Kit began HOM operations. [TT 2, 383:1-17].

HFU was doing well enough that it attracted an offer in 2002 of $5.0 million from a company specializing in operating home hospice care businesses ["Odyssey"]. [TT 1, 42:19-25, 43: 1-12]

Kit opposed the sale. [TT 1, 5-15, 390:11-24, 392:5-23]. Greg believed that this was a mistake. [TT 1, 44:2-22]. The disagreement over the sale began the deterioration of the marriage. [TT 2, 4-14].

Greg and Kit ultimately agreed to sell a portion of HFU to the employees under an "ESOP" program ["Employee Stock Purchase Program"]. This required changing the structure of HFU to a "C corp." [TT 1, 46:15-25, 47: 1-12].

The purpose of the ESOP sale was "to appease" Greg. "We didn't need the

money. I thought maybe he would be happy again if he had that." [TT 2, 394:19-24]. With the ESOP, "I would still be able to work there. *And he would have the money.*" [TT 395:1-5].

After the sale of 31% of the ESOP, Greg and Kit received in excess of $1 million from the first ESOP sale [TT 1, 83:18-22], and the second sale of another 31% interest, brought another $1,488,291. [TT 1, 84:1-5].

The remaining 38% -- the controlling or management interest -- belonged to the Jacksons; a marital asset valued at approximately $1.4 million. [TT 1, 84:6-11-24, TT 2, 9-25. The statements of value were made by Kit's attorney during cross examination of Greg]. "The Jacksons continued to receive approximately $270,000 per year from HFU. [TT 1, 86:1-4]. Indeed, as Kit's Counsel assessed it, with social security and 401(k) contributions, "I rounded it off to roughly $300,000. Can we agree that that's a fair calculation of the benefit received by the Jacksons from the business because they continue to own and manage it? A: Yes." [TT 1, 86:5-21] And, by Mr. Cotner, "they continued to receive that money in '05, '06, '07,'08 , '09, '10, and '11, seven years, fair to say? A; Yes" [TT 1, 13-21]. As one manager testified, "It's a money-making business." [TT 1, 162:4].

Because HFU had been started from scratch, the capital gains tax on the sale of stock to the employees would have been substantial. Greg and Kit agreed to an

arrangement in which the proceeds would be exchanged for similar investment property [a "1031" exchange], which would be investment accounts holding stocks and bonds of various companies. Greg and Kit would obtain cash from the sales by borrowing against those purchased investment funds. Those loans would be guaranteed by the investment accounts.

For estate planning purposes, at the time of Kit's death and at the time of Greg's death, their separate accounts would be probated, and any "gain" would obtain the stepped up basis, avoiding capital gains tax.[2]

The downside of the arrangement was that with deteriorating interest rates on investments, by 2013 Greg and Kit were each required to make up the shortfall between the ESOP obligations and the ESOP asset accounts in their respective names. Each paid $18,000 in 2013, for instance, to make up the shortfall. This liability continues to be the case. Indeed, Kit complained that she needed the majority of the marital assets "to ensure that no matter what happens with the ESOP or Morgan Stanley or UBS, Medicare, I have enough money behind me ...". [TT 2, 470:21-25].

During the entirety of the marriage, Greg paid for Kit's monthly health

[2] Post trial, because of deterioration in interest rates, each has been required to advance as much as $18,000 per year to meet the needs of the loan accounts, from their personal assets.

insurance [TT 1, 221:22-25, 22: 1-4], including for three years after trial.

As the marriage deteriorated, in 2009 Greg began to feel excluded by Kit, as she instructed the staff at HOM not to deal with Greg. [TT 1, 55:10-25]. However, HOM was enjoying income as an LLC of approximately $400,000 per year. Greg believed that, based on a rule of thumb of "eight to ten times net for the valuation of the company," that HOM was worth between $3.2 and $4 million. [TT 1, 57:1-4]. An experienced businessman, Bill Woody, testified for Kit at trial that, at a high point, hospices were valued at eight times "EBITDA" but that currently, he thought it was likely to be 3-4 times EBITDA. [TT 1, 222:15-22, 226:6-7].

From HFU, Greg and Kit paid themselves $150,000 per year, each. From the HOM (an LLC), they simply took "draws" of the annual surplus, which varied between $150,000 to $400,000 annually. [FF # 37, "the years 2007, 2008, and 2009 averaged an annual $203,539.00 payment *per owner*. In 2010, the year in which the parties separated, the draws taken were $32,787 per owner."]

Greg and Kit had an agreement that the HOM and HFU were "family" businesses. This was represented on their tax returns which consistently showed that each had a 50% ownership interest in the two hospices or the marital interest in the two hospices. [SN FF # 37, 38; Kit's trial exhibits S1 through S-9]

For the total value, the Special Master found that "the value of this marital

estate is approximately $11,571,266.00 with attendant liabilities of $2,496,580.26. The net marital estate is approximately $9,074,686.00." [CL# 17].

As of December 31, 2010 the value of the Jackson's remaining interest in HFU was stipulated as $1,409,482.00. *Respondent's Proposed Findings of Fact,* ¶ 109, p. 18, 3/12/2012. "The parties have stipulated ...".

Foe HOM, the valuation was contested, and the Special Master found as follows:

> CL # 26. HOM has been valued by two different experts with the resulting values of between $2,042,000.00- $2,294,000.00, or $485,000.00-18 $613,000.00. The goodwill value ascribed to Mr. Kero's valuation is $1,883,000.00- $2, 135,000.00. Mr. Langei's goodwill value is between $325,502.00- $453,502.00. This is a business in which no salaries have ever been paid and where, at this time, potential competitors have testified that they would not compete. It is a business that is not going to be sold to an outsider buyer. It is a business that may have profits reduced to some degree as a result of government regulations, but the testimony in this regard was that this reduction would place HOM more in the norm as opposed to its continuing to receive disproportionately large profits.
>
> CL # 27. The Court concludes that Mr. Kero's $2,042,000.00 valuation of HOM is a reasonable valuation and most closely approximates the actual value of HOM. In so doing, it recognizes a $1,882,502.00 value placed on the goodwill of this business.

The Special Master concluded that Greg had health issues, was considerably older than Kit, and had no prospects for future income or asset acquisition [CL # 5]. Kit was in good health and had an ongoing enthusiasm for managing the two

hospices [CL # 6].

On May 31, 2012, the Special Master awarded Greg 37% of the estate, consisting of some personal property, vehicles, the family home in Missoula, and the investment and cash accounts, totaling $3,321,227. Kit was awarded $5,753,458.00, including both of the family hospice businesses, the office building in Draper Utah, the home in Utah and the bulk of the cash and investments. [CL 44].

In addition, because Greg otherwise had no income from the marital businesses, just his pre-marital retirement, the Special Master ordered that Kit and Greg "shall both continue to receive equal compensation as officers in HFU." [p. 28, CL #21].

Both Kit and Greg filed objections. Kit believed she should have received all of the good will value of the businesses and that HOM was overvalued. Greg objected to the fact that Kit had been awarded all of the marital assets that produced income or had income potential: that his interest in HFU was "stranded" with no way to extract it. His sole source of income was his pre-marital retirement account of $49,000 annually, compared to Kit's award of what had been the entirety of their marital business income, equaling and exceeding in most years, $500,000 annually.

Greg argued that he was awarded income-consuming assets, while Kit was awarded the entirety of the income-producing assets.

Greg argued that the disparity and inequity of both assets, their nature, and resulting income was simply too great and violated MCA §40-4-202.

Thereupon ensued a lengthy period of time in which the District Court repeatedly, through numerous "status conferences," attempted to force the parties to settle. During that time, the District Court repeatedly asked that Kit make an offer of sale to Greg of her interest in HFU, and if Greg refused the offer, then Kit would pay to Greg that offered value. [As an example: "*Minutes and Note of Ruling*" 10/30/2103]. The Court ordered that Greg have until December 11, 2013 to respond to the offer, and that "if the offer is rejected, the Petitioner shall purchase the Respondent's interest in Hospice for Utah for the amount offered."

On December 17, 2013, Kit filed a "Notice to the Court" stating that HFU had refused to make an offer for Greg's share. HFU had not been ordered to make an offer, and Kit refused to make an offer even though ordered to do so.

Even though no final order had been issued dividing the marital property, Kit had refused to honor Greg's 50% interest in the two businesses with dividends from either one since the beginning of the year 2012 [Trial, March, 2012]. Yet, Kit demanded that Greg pay one-half of the income taxes for their joint return for the

year 2012, $24,919. [Exhibit B, Kit's "*Notice of Proposed Action*," 1/6/2014].

On January 6, 2014, the Court again ordered Kit to make an offer to Greg to buy out his share of HFU, and to find a substitute for the $150,000 annual salary, and that if Greg refused the offer, he was to buy out Kit at the amount of Kit's offer. ["*Minutes and Note of Ruling*," 1/6/2014].

On January 31, 2014, Kit made an offer of $400,000 for Greg's interest in HFU, but tied the offer to the resolution of all remaining issues in Kit's favor, including abandoning entirely the salary claim [*Letter*, Cotner to Sol, 1/31/2014, Exhibit A attached to "*Petitioner's Renewed Motion for Entry of Order*," 2/24/2015], as Greg noted, "Kit has twice now refused to make a bona fide offer," [*Brief,* p. 2].

Underlying the inequity of forcing Greg into a Hobson's choice of purchasing Kit's share of HFU, as an elderly, retired man with ongoing infirmities, was the notion that Greg had also been awarded only $160,760 in cash from the joint accounts valued at $1,363,296, [SM FF # 79] and an Ameritrade investment account of $242,623 compared to their overall joint investment accounts valued at over $768,390. [SM Findings of Fact #77].

In order the meet Kit's offer of $400,000, Greg would have been forced to spend all of his available cash, after having first been awarded only 15% of the

total marital cash available ($403,383 of $2,637,085).[3]

On February 25, 2014, Kit made a motion to compel the sale of HFU from Greg to Kit for $400,000. [*Motion to Compel Sale*].

On February 26, 2014, the Court held a hearing on the pending motions, and ordered that a full hearing would be held April 28, 2014. [*Minutes and Note of Ruling*, 2/26/2014].

On April 16, 2014, Greg filed a *Motion for Accounting and Distribution*, seeking a 50% ownership distribution, noting that the family businesses had generated $345,437 during 2012, of which Greg received only $32,500, and likely were to generate $633,885 in 2013.

On April 28, 2014, after testimony by HFU's accountant, John Savas, Greg elected to accept Kit's $400,000 offer. [*Minutes and Note of Ruling*, 4/28/ 2014]. As noted in the subsequent "*Petitioner's Motion for Relief*," 5/20/2014, Greg had anticipated that the purchase would also provide for the $150,000 annual salary that the Special Master had awarded, but that the District Court had originally declined to award as it imposed a burden on HFU, which was not a party to the action. Incidental to the hearing, Kit had attempted to introduce evidence of a re-

[3] The total of eight banking accounts, a Pershing account, an Ameritrade Account, an American Equity Account. Separately, each party also received equal Fidelity 401K accounts valued at approximately $426,000 each.

valuation of HFU's appraised value. The Court refused the testimony as the issue was not before the Court. [*Minute Entry and Note of Ruling,* 4/28/2014].

The Court issued an oral order that Greg pay to Kit $400,000 for her interest in HFU, that a covenant not to compete be imposed, and that she not interfere with the operation of HFU. [*Minute Entry and Note of Ruling*, 4/28/2014].

On May 20, 2014, Greg filed a *Motion for Relief.* He had been advised by Kit that prior to the hearing Kit had encumbered HFU with a "management contract" that gave her exclusive management control of HFU for five years, with an option for five more. [Exhibit E, *Motion for Relief*], guaranteeing her a management salary of $175,000.

That was a substantial long term liability and removed management control, including the anticipated management salary, that Greg might have had by buying out Kit's interests.

Ultimately, the District Court issued its own Findings of Fact, Conclusions of Law and Decree. [*Findings, Conclusions and Order*, May 15, 2015].

The Final Order

The District Court radically changed the proposed Findings and Conclusions of the Special Master. Succinctly, in contrast to the Special Master's award of $150,000 per year to Greg, the District Court awarded $40,000 per year for just five years, and radically revalued both family businesses.

The disputed distribution is summarized at Appendix C, Asset Award Reconciliation.

HFU

For HFU, the valuation was revised downward from the stipulated value of $1,409,482 to $800,000. Inexplicably, the District Court revised the stipulated valuation for the following reasons:

> 27. As of December 31, 2010, the value of HFU was $3,709,164.00. The outstanding common stock owned by the Jacksons is valued at $1,409,482.00 and the outstanding ESOP preferred stock is valued at $2,299,682.00. Petitioner's Exhibit No.6. However, while the parties stipulated to this value, neither was willing to value HFU at this amount when the opportunity arose to purchase each other's shares.

That misstated the evidence, and also based the "evidence" on a bizarre series of forced negotiations imposed by the Court over a three year period.

Kit wanted HFU. Greg didn't.[4] He had not been awarded the cash to purchase Kit's interest in any event.

HOM

At trial, the stipulated tax returns for HOM showed that Kit and Greg were equal co-owners of HOM, and had always treated it as a 50/50 ownership, an agreement declared under penalty of perjury.[5] Income ranged from $170,954 per

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[4] Both parties noted in their proposed Findings that Kit would get the businesses.

[5] Kit's Trial Exhibit No,'s S-1. S-2. S-3. S-4. S-5, S-6, S-7, S-8, S-9.

year to as high as $411,079. [DC FF #43].

The Special Master had found that the "Jacksons take distributions from the business, which are partly compensation and partly a return on equity." [SM FF # 62]. This had been based on Kit's own expert witness testimony that, "I'm adding back those distributions [that] are partly compensation and partly a return on the business, the equity." [TT III 702:7-11].

At FF #42, the District Court changed the Special Master's Finding, and determined that the marital income from HOM

> "related solely to the continued efforts of Kit, and were merely reported as draws from HOM, a Montana Limited Liability Company, by its two owners, Kit and Greg. At no time did Kit receive a salary from HOM. The distributions to Kit and Greg were, in essence, her compensation."

The inherent value was the income generated for Kit and Greg, not for a "fair market value" nor for a salary for a manager already paid a full salary by HFU. Kit testified that she has no expectations of liquidating those businesses to get value as a sale. [TT III 793::8-11].

EFFECT OF DISTRICT COURT'S REVISIONS PROPERTY AWARD

The District Court's revision of HFU downward from $1,409,000 to $800,000, and the revision of HOM from $2,042,000 to $613,000, reduced the value of the marital estate from $9,074,686 to $7,396,686 (-$1,678,000).

The District Court then gave Greg a 50/50 share of HFU [DC CL # 22] and

awarded all of the value of HOM, $613,000 to Kit. [DC CL # 31].

INCOME

As noted above, during the marriage the Jacksons had four sources of income:

1) Income from HOM, taken *by agreement* as owner draws on a 50/50 basis averaging $293,097 per year.

2) Income from HFU, *by agreement* as manager salaries, of $150,000, for a total of $300,000 per year.

3) Income the ESOP account receivable (total $742,245, Sm FF # 82), of $14,000 total each month, $168,000 per year ($7,000 each). DC FF # 33. However, as the District Court noted, the account had been paid off post-trial and is no longer income to either party. [DC FF # 91].

4) Greg's pre-marital retirement income, of $2,432.00 per month, and $1,850 in social security benefits, annually totaling $51,384.00. [DC FF #90].

5) Greg noted that while Kit was awarded the asset value of the Utah residence, and that the mortgage remaining was deducted from that value for the purposes of awarding that asset to Kit, that HFU was actually paying the mortgage. [DC FF #40. "HFU pays rent to Kit ...". Kit's testimony was, however, that "HFU pays the mortgage." TT III, 725: 23-25, remaining balance $188,000.]. This, Greg contended, was additional income to Kit of $1,087 per month, [TT II,

447:14-25, 448: 1-13], $13,044 annually. Neither the Special Master nor the District Court considered this as "income" to Kit.

The total annual average income during the marriage was $825,525. Without the receivable from the ESOP sale, the post-trial expectation was $657,525 annually.

Of that income stream, Greg was awarded his $51,384 retirement (a pre-marital asset). In place of the $150,000 "salary" that the Special Master had awarded Greg based on her perception of his ownership share and his need for income, the District Court, without explanation, substituted a $40,000 annual "property settlement payment" from Kit to Greg, terminating after five years. [DC CL # 39].

IV. ARGUMENT

STANDARD OF REVIEW

The Supreme Court reviews a District Court's findings of fact to determine whether the findings are clearly erroneous. M.R. Civ. P. 52(a); *Denton v. First Interstate Bank of Commerce,* 2006 MT 193, ¶ 18, 333 Mont. 169, ¶ 18, 142 P.3d 797, ¶ 18. A District Court's findings are clearly erroneous if the findings are not supported by substantial credible evidence, if the Court has misapprehended the effect of the evidence, or when a review of the record leaves this Court with a definite and firm conviction that a mistake has been made. *Denton,* ¶ 18.

A District Court's conclusions of law are examined to determine whether the District Court's interpretation and application of the law is correct. *Sunday v. Harboway*, 2006 MT 95, ¶ 17, 332 Mont. 104, ¶ 17, 136 P.3d 965, ¶ 17.

In turn, a District Court can only revise a Special Master's proposed Findings of Fact and Conclusions of Law based on "clear and convincing proof."

A. Did the Special Master incorrectly divide the marital estate under the standards of MCA 40-4-422?

As shown the facts, the Special Master awarded Greg 36% of the net marital estate and Kit 61%. Greg's portion included his pre-marital pension valued at $499,000. As Judge McLean noted in his additional Findings, Greg's retirement income was not necessary to meet any family needs and was allowed to accumulate. But, this represented an additional marital cash accumulation of nearly $500,000. Greg was, however, only awarded $160,760 of their ***eight*** joint marital checking accounts whereas Kit was awarded $1,202,537.00. Greg was also awarded $242,623 in an Ameritrade investment account, whereas Kit was awarded $525,767 in similar accounts (Pershing and Fidelity).

In essence, of the $3,134,306 awarded to Greg, nearly $1 million was traceable to his pre-marital assets[6], leaving just $2,134,306 of marital assets

[6] The combination of the net present value of the pension, $499,000, plus the accumulated cash from amounts paid out and deposited in the joint accounts, of approximately $500,000. In essence, the District Court, in its lopsided distribution of the cash accounts, awarded most of the cash received by the marriage from Greg's retirement ... to Kit!

distributed to Greg (30%). In contrast, Kit, who arrived in the marriage armed only with student loan debt, was awarded $4,955,414 of entirely marital assets (70%).

Further, Greg was awarded just his retirement income of $49,000 ($4,282.00/month) against monthly living expenses of $7,000 a month ($84,000/year), [DC FF #90, 91]. Kit was awarded monthly income of $23,937.00 per month, far in excess of her monthly needs. [DC FF 92].

The District Court's finding of $23,937 per month income to Kit was an additional new finding. There was no support for it in the Special Master's Findings. It was wildly inaccurate. The Special Master had noted that HFU had paid out $150,000 each to Greg and Kit [SM FF #28] and that HOM paid out "an average of $203,539 "per owner" for the years 2007, 2008, and 2009, and $32,787 each for 2010." [SM FF #37]. That represented average income "each" of $160,851, or total marital income from HOM averaging $321,702, or $26,808.50 per month.

The District Court acknowledged this at DC FF #42.

But the Court failed to note that from HFU, Greg and Kit took salaries of $150,000 "each" for total additional compensation of $300,000 per year, or $25,000 per month.

The total marital income for the four years averaged $621,702 annually, or $51,808 per month! If Kit succeeded to only a single payment of $150,000 salary at HFU rather than the $300,000 that had previously been marital income, that still meant an average income of $471,702 annually that Kit was awarded as a result of receiving the businesses, or $39,308.50 per month.[7] That compared with the $4,282 that the District Court acknowledged Greg was receiving [DC FF #90] as against his monthly expenses of $7,500. [DC FF #90].

VALUATION OF HFU

For HFU, the parties had stipulated at trial that the marital value (which was a partial but controlling ownership under the terms of an Employee Stock Ownership Plan or ESOP), was $1,409,482.00. The Special Master had split this equally. [SM FF #26, CL #20].

For HOM, the valuation was contested, and both Kit and Greg called expert witnesses, agreeing that valuation should be a "fair value," rather than a "fair market value." [SM FF # 55].

Despite the stipulation as to value at trial of $1,409,482 [SM FF 26, CL 20], Judge McLean reduced the value to $800,000, based on the following reasoning:

29. Despite this, Greg later decided to offer to purchase Kit's

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[7] Kit's surreptitious "Employment Agreement" dated January 1, 2014 raised her "salary" to $175,000, apparently on the grounds that Greg was no longer receiving his $150,000 per year salary. At the $175,000 annual salary, Kit's monthly income was still $41,392 per month.

shares for $400,000.00. However, after conducting due diligence, he reconsidered. According to the evidence presented, and the agreed process, the value of the Jackson's shares in HFU, as determined by this process, is $800,000.00. Had Greg thought this was a favorable price he would have exercised his option to purchase Kit's shares.

The fact is Greg objected to the idea that Kit could "establish" her own value by an "offer" process, that Greg, a retired elderly man with health issues and having had heart surgery in 2001, would buy out Kit's share of HFU and that, if he did not, she got the business at the value that she herself had set.

As noted in open court at the final hearing held April 28, 2014.

MR. SOL: Well, with regard to the first issue, Your Honor, we had filed our objection to that process because it did change the respective percentages.

THE COURT: Well, we're not going to hear anything about the estate, other than your client is without any salary from Hospice for Utah.

MR. SOL: Yes.

THE COURT: So, the only thing we can do is sell Hospice for Utah, and get him - he's claiming that he has got his value of the estate all tied up in Hospice for Utah, and has no say in it - that he's getting a bum-deal.

The solution to that is sell Hospice for Utah. That's the only solution.

MR. SOL: And, I agree, Your Honor.

THE COURT: Okay.

MR. SOL: It's like any other divorce -

THE COURT: So, how do we sell it?

MR. SOL: Well, there is an appraised value. That was established by our expert witnesses, and that's what commonly is used in divorce proceedings to allocate value, and that's what happened in this case.

We have a value, that has been established by expert witnesses. It was stipulated to by the parties at trial.

THE COURT: Okay, is your client ready to pay that for it?

MR. SOL: To buy her interest?

THE COURT: That's -

MR. SOL: Well, she wants the management.

THE COURT: No, I'm - no, my question is - is your client ready to pay her for that?

MR. SOL: At the appraised value.

THE COURT: Yeah.

MR. SOL: We'd have to discuss that. I mean, she has all the - she has the cash. So -

THE COURT: Is your client ready to buy Hospice for Utah at the appraised value?

MR. SOL: Well, we haven't discussed that, Your Honor. It's a new question.

THE COURT: Well, no, let me keep this simple. [To Mr. Cotner] What is your client ready to pay Greg Jackson for his share of Hospice for Utah?

MR. COTNER: Four hundred thousand.

THE COURT: Okay, and is your client ready to pay Kit Jackson four hundred thousand for her share of Hospice for Utah?

MR. SOL: Well, he does not have those cash resources because they weren't allocated.

THE COURT: Well, the answer is "no."

MR. SOL: The answer is "no," Your Honor, because Kit Jackson stipulated at trial that she wanted that business. She stipulated to the value. That's a matter of record.

We don't think that this is a matter -

THE COURT: Well, Michael, that's not getting us anywhere. Today is the last day. If you walk out of here without anything today, you'll have to have the Supreme Court find you a Judge somewhere in the state of Montana because I'm done with it after today.

Hearing Transcript, 4/28/2014 pp 7-8.

Indeed, Kit *agreed:*

MR. COTNER: "We're not here to retry a case that was tried in March of 2012, and establish a new value for Hospice for Utah.

HT, 5:17-19.

Indeed the CPA for HFU testified specifically that there was no basis to change valuations due to any change in business conditions.

Q (BY MR. SOL) John, I guess, to answer my question - you haven't really seen any significant changes that would affect profitability or valuation? Is that correct?

A Correct, yes. There have been a few issues related to Medicare holdbacks, but those haven't affected the values in the way those values have been calculated. HT, 145: 16-23.

That, based on Kit's own advice, that HFU was on an upward trajectory on

incomes, and would say "we are going to do better." [HT 164: 7-14].

As noted at the hearing, Greg finally accepted Kit's $400,000 offer, because it also "waived the salary issue." [HT 174 11-13]. Of course if Greg succeeded to the $150,000 per year salary as manager, the valuation of $400,000 had a different meaning than if he did not.

Indeed, the following transpired:

> MR. SOL: He is accepting her offer to sell at four hundred thousand dollars.
>
> THE COURT: That the Petitioner will purchase Kit's interest in Hospice for Utah for four hundred thousand dollars?
>
> MR. COTNER: That's my understanding.
>
> *HT* 175: 12-19.

Of course, that was not true. Kit represented that she was selling all of her "interest" in HFU and that was patently untrue. She had surreptitiously – and in violation of the economic restraining order in effect -- retained her management interest and control through a long term, binding employment contract, and had even increased her cash flow out of the business. She "retained" the entire purpose of having an "interest," that is, a continuing large payout of salary. She failed to disclose that even as the issue was discussed in open court.

VALUATION OF HOM

The District Court also reduced the valuation of HOM from $2,042,000 to

$613,000 [DC FF #76].

The Special Master had heard the testimony of the expert witnesses for Kit and Greg. She had accepted Greg's expert's [Walt Kero] appraisal. [SM CL # 27].

The District Court's reasoning for reducing the valuation was that much of the value was "goodwill" based on the testimony of "both experts." [DC FF # 73]. The District Court also concluded that Greg had "refused to be awarded HOM" for a "reduced value." [DC FF #72].

Special Master's Conclusions of Law #6.

> "Greg is 68 years old, has health issues, and will no longer work full-time. Kit is 59 years old, is healthy, and has no desire to stop working in the field she loves. She will have the opportunity to acquire future capital and income."

The District Court agreed. FF # 92: "Greg has retired, has little opportunity to earn future income and acquire future assets."

The District Court's findings were problematic. Greg had never "refused to be awarded" HOM.

The District Court also found, in rejecting the "Kero" valuation, that Kero had "failed to take into consideration the length of stay of patients, which is critical to a hospice's cash flow." [DC FF # 74.] However, Kero specifically testified that "length of stay" was an economic factor and "reflected in the revenues you look at." [TT III, 617:1-2] "Length of stay isn't particularly useful to

you until its translated into revenue and its translated into expenses?" Kero: "That's true." Q: "And that's what you looked at?" Kero: "That's true." [TT III, 617: 13-20].

At FF # 76, the District Court summed up its view for replacing the Kero valuation of HOM with Craig Langel's: it was a more "thorough" valuation.

However, that also mischaracterized the evidence.

Kero had done a valuation of both HFU and HOM. To be consistent, Kero recognized that the HFU annual ESOP valuations were done in a manner very similar to marital valuations, for similar purposes. [TT III, 613:12-28]. That, in his opinion, HFU offered a comparable valuation that neither Kero or Langel could otherwise locate. "We're more or less comparing apples to apples, and ... it gave us a better thing to compare to." [TT III 614:1-5]. Kero had also discussed the valuations with the person who annually prepared the HFU valuation, Bruce Turner, an ESOP specialist, and Kero had also discussed HFU's accounting with HFU's accountant, John Savas. [TT III, 573:18-20]. Langel had not.

SALARY FOR KIT FROM BOTH HFU AND HOM

The Special Master noted that a key difference in the HOM valuations was whether a full-time salary should be included in HOM's. Kero did not include one, Langel did.

60. Mr. Langel adjusted his value to reflect a salary with the assumption that if Kit

were not there, a replacement would be required and a salary paid. His adjustments started at $125,000.00 in 2006 and increased by $25,000.00 per year until2009 and 2010 when he utilized a salary of $200,000.00.

62. Mr. Kero suggests that a salary adjustment results in a reduced business valuation. Mr. Kero did not make such an adjustment because there was no history of either Greg or Kit's ever having been paid a salary by HOM. The Jacksons take distributions from the business, which are partly compensation and partly a return on equity.

The Special Master justified not including the value of a separate salary for Kit as part of the valuation process on the grounds that, in addition to the payment of a full time salary from HFU to Kit, the value of HOM to Kit was the fact that it was as part of the overall marital strategy to NOT to pay in salaries from HOM in order to minimize taxes and maximize personal profit. Kit had no intention of changing those arrangements.

SM CL # 26. This is a business in which no salaries have ever been paid and where, at this time, potential competitors have testified that they would not compete. It is a business that is not going to be sold to an outsider buyer. It is a business that may have profits reduced to some degree as a result of government regulations, but the testimony in this regard was that this reduction would place HOM more in the norm as opposed to its continuing to receive disproportionately large profits

The District Court reversed these findings, stating:

DC #75. Mr. Langel, on the other hand, properly considered appropriate adjustments. First, he took into consideration information provided by Kathy Klienkopf, a vocational expert, with respect to a reasonable salary for a person in Kit's position. Secondly, he considered the appropriate factors to assess the risk of the Hospice of Missoula business.

The issue of contention was that Langel deducted a large salary for Kit from

the earnings of HOM. The parties agreed that Kit already received that salary, $150,000, from HFU, as did Greg. Kero pointed out that these were marital businesses. As owners, Kit and Greg were entitled to maximize benefits to themselves (deductible C-corp salaries from HFU, and owner LLC draws from HOM). Langel, Kero noted, had created a loss for HOM "by adding in a management salary that wasn't in fact taken from the business." [TT III, 585:12-7]

Since Kit was dividing her time 50/50 between HFU and HOM, and paid the equivalent full-time salary by HFU, it didn't make sense to award her two full-time salaries, *for the sole purpose of reducing the marital valuations.* Kero noted that, if the salaries were pro-rated, that would reduce the valuation for HOM, but then it would also decrease the deduction taken for salaries from HFU and increase the marital valuation of HFU. Unless pro-rated, it would be "double-dipping" paying two full-time salaries to one person, for the single purpose of reducing marital valuations. [TT, III, 582: 1-25, 583: 1-25].

Q. (By Mr. Sol) Did you see an adjustment that Mr. Langel used for owners' salaries?

A. Yes.

Q. And what did you think of that?··Did that cause you to change your valuation or add it into your report or why didn't you?

A. Well, I just questioned it on the basis of, well, it could be legit to put in there. But if it wasn't legitimate, why did they book them on the fly?

What I mean by "on the fly" is why didn't they do it in those prior years.

They may have a legitimate answer to that, but I didn't get to that.

Q. The fact is, they didn't take those salaries?

A. Right.

Q. And you did determine that they were taking those salaries from Utah?

A. Yes.

Q. If there was a management function between -- you said these are the same people putting a prorated management function on Missoula. Would that increase the value of the Utah hospice?

A. Potentially, yes.

Q. Okay. And so basically it's -- it would be double-dipping, wouldn't it?

A. If you just did it one way. If you just took into account that, well, we're going to put salaries on ESOP from -- or, I mean, on the Hospice of Missoula and then have a corresponding no-effect on the Utah hospice, well, then it's just kind of a one-way adjustment.

And that, you know, unless the facts and circumstances justify that, you wouldn't do that.

Q. [You] don't get two CEO salaries for the same CEO?

A. Right.

Q. Now, you indicated when you reviewed Langel's report, one of the key differences with yours is that by adding the owners' salaries he created a loss in a key year; is that correct?

A. Yes. [TT. III, 581:19-25, 582: 1-25, 583: 1-25]. ...

Q: So it actually became a good benchmark for us because without the discounts of the ESOP valuation, then we're kind of more or less comparing apples to apples. Because ESOP, no discounts. And so it gave us a better

thing to compare.

Q. Okay. So this ESOP didn't use ESOP discounts?

A. That's right.

Q. It's more appropriate to valuation for what we're talking about today?

A. That's correct. [TT, III, 614:1-8].

Q. In fact, this one does have economies of scale because Kit Jackson is running two businesses; isn't that correct?

A. Correct.

Q. Isn't that what you do when you have more than one business is to try to get the economies of scale at the administrative level?

A. Yes. You're spreading those overhead costs over more revenue and that's where the savings comes in. [TT, III, 614: 1-25].

Q. (By Mr. Sol) Didn't it start out as a mutual ownership for this marriage?

A. Yes.

Q. And Kit Jackson is the CEO of both of them. She's still the CEO of both of them?

A. That's my understanding, yes.

Q. So administrative costs, it's a benefit to her to have two businesses, because she does get the economy of scale at the business level?

A. Yes.

Q. In fact, testimony showed that there's -- and I'm going to ask you if you saw this -- that there are administrators being paid and trained in both locations?

A. Yes. I assumed so. It would only make sense.

Q. And they're receiving salaries part of the expenses?

A. Yeah, and in some cases more.

Q. Walt, following up on what Mr. Cotner was saying about these two businesses and the personal tax returns. Is there a tax advantage to being an owner of a business as opposed to merely a CEO?

A. Yes. You're participating in the profits that are therefore the owners' above and beyond salaries and fringe benefits and whatnot.

Q. And if Kit Jackson, who's indicated that she wants to maintain her current positions -- her current ownership positions with both of these businesses, is there -- as an owner, is there an advantage of her being an owner as opposed to a CEO?

A. Yeah, because you're given the ability to influence policy more so than the CEO, and that policy can be pretty -- you know, have value to it, if you will.

Q. So for the perfect world in a divorce situation she's not here as a CEO, she's here as an owner. This is a marital asset. [TT, III, 623: 5-25]. [Emphasis added].

A: I would say so. [TT, III, 624: 9.]

GOODWILL

In contrast to Kero's observation that they did have a comparable business – HFU – Kit's witness, Langel, testified that he had been unable to find a business comparable to HOM. [TT III, 645:21-25]. He had not examined HFU or the ESOP valuation for HFU. Unlike Kero, he had not spoken to ESOP specialist Bruce Turner, HFU accountant John Savas or any one else familiar with hospice

operations. Langel argued, without evidence, that he believed that Kit Jackson was the "face of the business" and that the goodwill value of the business therefore "belonged to Mrs. Jackson." [669:7-14] He had made that conclusion "mostly" from Kit Jackson herself. [671:9-17]. From her, Langel believed she had been "in business for 40 years." [672:20-25] despite Kit's acknowledgment to the Court that HFU had been started with Greg's encouragement and financial support in 1999, just 13 years before the 2012 trial date. [TT 1, 30:1-25] The Special Master had concluded there was no evidence that Kit was the "public face" of the business [SM FF # 51] a Finding the District Court struck.

RISK

The Special Master had accepted the valuation for HOM offered by Greg's witness, Walt Kero. [SM FF # 53-69, CL # 25-27]. The Special Master noted that the key points for the $2,042,000 valuation were the facts that 1) the parties had chosen to pay the management salaries from HFU, 2) chosen to pay owner draws from HOM, 3) the business was not going to be sold to an outside buyer, and that 4) Kit herself offered the testimony that competitors would not choose to compete, that risk was low. [CL # 26].

Kit however had also convinced Langel that the risk factor for the business was relatively high, because of the low cost of entry for the hospice business. [TT III, 674:19-25, 675: 15]. Langel then also claimed that the business risk was high

because HOM was a "lucrative" business. [675: 5-10].

But Kit also called several witnesses who then claimed *that the risk was low*, because nobody wanted to compete with Kit! A would-be competitor, Bill Woody, testified that he had wanted to open a Missoula Hospice, but that "when she [Kit] showed up and I saw what she was doing, I knew that I had already missed my opportunity." [TT 214: I, 5-7]. "There are very few people like her. They make or break a smaller business. In a larger business you can hide non-performers." [TT 217: 19-24]. Indeed, that if anyone attempted to compete, Kit would "put them out of business." [TT 220:7-8].

Kero, valuing the risk at "0," was closer to Kit's own witnesses than was Langel, who valued it at "6." Indeed, Kero noted he followed the established methodology used for HFU where "the competition for Hospice in Utah is the most competitive market in the country," [Medical Director Gary Holland, TT I, 239:22-25], and where the annual "risk" factor used was "0."

Indeed, unlike Kit's expert, Kero in fact relied on the valuation process used for a comparable hospice: HFU. Langel used no such comparable.

> Q. And you were able to review those documents for the ESOP valuations, weren't you?
>
> A.··Yes.··And I wanted to add, too, you asked me a question previous if t here was other people I talked to. I talked to John Savas in Utah, who was the CPA who does the books and tax work for those folks in the Hospice For Utah, and the ESOP valuator in San Diego.

Q. Okay. So you do have some familiarity also, then, with the Hospice For Utah?

A. Yes. [TT, III, 574:11-24].

CAPITALIZATION

The Special Master noted that the capitalization rates were most significant in the differing valuations.

> FF 59. More significant differences between the valuations lay in the capitalization rate used by each CPA Mr. Langei used the higher capitalization rate of 24.5% compared to Mr.Kero's 16.31%. The result of a higher capitalization rate is a lower business value.

The District Court adopted that finding.

The District Court then rejected the Kero capitalization rate without explanation. [DC FF # 62.]

Kero had defended his capitalization rate.

Q. Okay. Why didn't you use that capitalization rate [Langel's at 24%]?

A. Well, we just went through on how I built up the capitalization rate. You know, this little discussion we had previously.··And I compared our methodology and I just didn't see how Craig built up his discount rate. I didn't see that. I just know he had a rate. And I said, well, am I out to lunch here on this? And so I compared it with the ESOP valuation and found that the discount rate they employed was 16 percent. So I said, okay, well, I'm using 16.31. That's relatively close.

Q. So in the course of coming up with your valuation, you did -- sometimes they're called sanity checks, aren't they?

A. Yes.

Q. And you did a sanity check on the Hospice For Utah that showed the capitalization rate that you used was very similar to that? [TT, III, 578: 17-25, 579:1-25, 580:7-16].

The Special Masters distribution of the estate, 37% to Greg and 63% [CL 44] to Kit was problematic given that the party with the least ability to earn income and accumulate assets was awarded the fewest assets and no income-producing property at all. Given that $499,000 was Greg's pre-marital asset, on that basis his award of marital assets was just 34%, while Kit's was 66%.

The Court must give consideration to the parties' occupations, amounts and sources of income, vocational skills, employability, estates, needs, and opportunities for future acquisition of capital assets and income. MCA §40-4-202, *Vance v. Vance*, 204 M 267, 664 P2d 907 (1983).

In *Smith v. Smith* 191 Mont. 200, 622 P.2d 1022 (1981) the District Court was found in error where it recognized the significant disparity in earning power of parties after more than 23 years of marriage, but then failed to consider wife's inability to acquire property in the future.

A court may allocate property acquired during a marriage on an equitable basis, but an inequitable distribution will be overturned. *Finlayson v. Finlayson* 160 Mont. 64, 500 P.2d 225 (1972).

Indeed, ordinarily the earning power of one spouse post-dissolution, if substantially greater than the other, will justify a disproportionate award of

property to the other spouse. The opposite has been done here. In *Hodgson v. Hodgson*, 156 Mont. 469, 482 P.2d 140 (1971), on that basis the court decreed 71% to wife, who had inferior prospects, and 29% to husband, who retained his earning power.

The fact that a spouse's quality and length of life and future income potential is drastically reduced, it must be considered. *In re Marriage of Hayes*, 60 P.3d 431, 312 Mont. 440 (2002).

In dividing the property, the District Court shall consider the opportunity of each spouse for future acquisition of capital assets and income. MCA §40-4-202. *In re Marriage of Beadle*, 291 Mont. 1, 968 P.2d 698 (1998).

Division of marital property was not arbitrary and capricious where, in awarding husband a greater portion of property, court considered elements required by statute, health and employability of husband were both poor, and wife's opportunities were much greater. *Crabtree v. Crabtree*, 200 Mont. 178, 651 P.2d 29 (1982). In a remarkably similar case to the Jacksons, a retiring, ill husband was awarded 56% of the marital assets where the wife intended to remain employed for 5 to 7 years and that she had no current health problems. *In re Marriage of Smith* 67 P.3d 199, 314 Mont. 421 (2003).

Here, the Special Master simply did not follow what MCA §40-4-202 requires, and her compensatory effort to include a $150,000 annual salary, was in

turn eliminated by the District Court in its review.

B. Did the District Court improperly alter the Special Master's findings?

The District Court finally issued its own Findings, Conclusions and Decree on May 6, 2015.

Greg once again argued that the division of marital property was arbitrary and capricious. *Crabtree v. Crabtree* 200 Mont. 178, 651 P.2d 29 (1982).

Rule 53(e)(2), M.R.Civ.P. explicitly states "in an action to be tried by the court, the court must accept the Master's Findings of Fact unless clearly erroneous." [*Reply Brief, Motion to Alter or Amend*, 7/24/2015]. Indeed, Greg noted that in an earlier District Court ruling, that Greg receive the "Pershing Account" in lieu of his annual salary that the Court rejected, [*Minutes and Note of Ruling* 8/13/2013] had simply disappeared from the record. [*Reply Brief*, p. 7.]

The fact is, the District Court did not explain by finding the Special Master's findings and conclusions "clearly erroneous" why it had substantially changed the valuation and distribution of the marital assets.

C. The Court identified substantial additional funds attributable to Greg from pre-marital sources in the marital estate, but then did not account for them in the marital disposition nor award them to Greg.

In particular, the District Court found at Finding #94 that "it is clear that Greg provided some contributions to the martial estate, but that such contributions

are dwarfed by Kit's substantially greater contributions to the martial estate." This is puzzling because the Court included the present value of Greg's pre-marital retirement in the marital estate [$499,224, FF # 82], and noted that the whole of his retirement income since retiring in 2001 *has been preserved because of the hospice income,*[8] [$588,000]. The sum of pre-marital assets, then, attributable to Greg is $1,087.24. This is what Kit referred to as their "nest egg" while she went through seven jobs and as they took the risk of beginning the hospices.[9]

From those cash accounts, Greg was awarded $160,759.73 [CL #35].

The fact is, the Jacksons had long standing agreements regarding their *ownership* interests.

Courts cannot rewrite the agreements of the parties.

Montana law requires that "[a] contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect if it can be done without violating the intention of the parties." MCA § 28–3–201, *Marriage of Deschamps* 354 Mont. 94 223 P.3d 324 (2009). When the parties reduce the contract to writing, the District Court should ascertain the

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[8] Testimony at trial was that Greg received $49,000 per year in retirement income. Through 2012, that would total $588,000.

[9] The Special Master made a specific finding that Kit had described Greg's retirement account and income as "their nest egg" at FF # 86. In its May 6, 2015 Decree, the Court left out that portion of the finding in its reiterated finding at FF # 94, although there was no "clear and convincing reason" to do so.

intention of the parties from the writing alone, if possible. MCA § 28–3–303; *SVKV, L.L.C. v. Harding*, 2006 MT 297, ¶ 43, 334 Mont. 395, 148 P.3d 584. The District Court must determine the mutual intention of the parties at the time of contracting, MCA § 28–3–301, and any uncertainties are resolved most strongly against the party who caused the uncertainty. MCA § 28–3–206.

Both Greg and Kit had long ago agreed that their ownership interests were to be 50/50 in the family businesses, as shown by their penalty of perjury signatures on the joint tax returns, identifying specifically their 50% interests.

The tax returns set forth those ownership interests in the "plain language" that courts are obligated to enforce. *Marriage of Bushnell* 375 Mont. 125 328 P.3d 608 (2014)

Indeed, throughout, Greg remained equally liable for all taxes and debts, by virtue of his relationship with the businesses, and as a joint signer on their federal and state tax returns.

CONCLUSION

The Special Master improperly distributed the marital estate by not taking fully into account the age, health, earning capacity, and ability to accumulate assets as required by MCA §40-4-202, and disproportionately awarded assets to the party with the *greatest* abilities to earn future income and acquire assets.

The District Court added considerable confusion with a substantial number

of changes of findings (the highlighted yellow portions submitted in Greg's *Motion to Alter or Amend* of June 23. 2015) which did not meet the criteria required by Rule 53(e)(2), M.R.Civ.P..[10] The Special Master's findings and conclusions were not "clearly and convincingly wrong."

SUMMARY

Greg requests the following relief:

1. That the valuations of the family businesses be restored to the values found by the Special Master, and that 50% of those values be distributed to Greg.

2. That the $150,000 per year income assigned to Greg be restored as additional property distribution.

3. That Greg's full value retirement contribution to the marital estate – annual retirement income since 2001 from pre-marital assets -- be awarded to him.

4. That profits from the businesses earned since the beginning of 2012 be accounted for and divided equally between the parties until final distribution, since Greg has borne the equal risk of continuing to be a co-owner of the businesses.

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[10] Rule 52 of Montana Rules of Civil Procedure, "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses..."

Dated this 6th day of October, 2016.

SOL & WOLFE Law Firm PLLP
Attorneys for Plaintiffs and Appellants

By: _____

Michael Sol, PC
101 East Broadway #300
Missoula, MT 59802
Telephone: (406) 728-4727

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October, 2016, copies of the above and foregoing pleading were served upon counsel of record by mailing the same, postage prepaid to:

David B. Cotner
Datsopoulos, MacDonald & Lind
201 West Main, #200
Missoula, MT 59802

_____

Certificate of Compliance

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Opening Brief is printed with a proportionately spaced Times Roman text typeface of 14 points; is double spaced; and the word count calculated by WordPerfect 12 for Windows, is less than 10,000 words, not averaging more than 280 words per page excluding certificate of service and certificate of compliance.

Dated this 6th day of October, 2016.

_____

Michael Sol, PC

APPENDIX

APPENDIX A – Proposed Findings of Fact, Conclusions of Laws, Special Master

APPENDIX B – District Court Findings, Conclusions and Order

APPENDIX C: Summary of Estate Assets and Contested Valuations